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4 UNITED STATES DISTRICT COURT
5 WESTERN DISTRICT OF WASHINGTON
6 AT SEATTLE

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8 In re Washington Mutual, Inc. Securities,
Derivative & ERISA Litigation

Case No. 2:08-md-1919 MJP

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10 IN RE WASHINGTON MUTUAL, INC.
SECURITIES LITIGATION

Lead Case No. C08-387 MJP

ORDER ON MOTION TO REMAND

11 This Document Relates to:

12 No. C09-664 MJP
13 No. C09-816 MJP

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15 This matter comes before the Court on Lou Solton's and City of San Buenaventura's
16 (collectively "Plaintiffs") joint motion to remand their actions, Nos. C09-664-MJP and C09-
17 816-MJP, respectively, to the Superior Court of the State of California. (No. C08-387-MJP,
18 Dkt. No. 99.) Having reviewed the joint motion, Defendants' response (No. 08-md-1919-
19 MJP, Dkt. No. 355), Plaintiffs' reply (No. 08-md-1919, Dkt. No. 359), and all papers filed in
20 support thereof, the Court DENIES Plaintiffs' motion for the reasons set forth below.

21 **Background**

22 Plaintiff Lou Solton, Monterey County Treasurer, filed suit on behalf of the Monterey
23 County Investment Pool in the Superior Court of the State of California, County of San
24 Francisco, against several officers and directors of Washington Mutual, Inc. ("WaMu") and
25 Deloitte & Touche LLP ("Deloitte"). (No. C09-816, Dkt. No. 2-10.) Plaintiff City of San

1 Buenaventura filed an identical suit in the same court. (No. C09-664, Dkt. No. 2-4.)
2 Plaintiffs' complaints track the same basic claims raised in the 22 other cases that were
3 consolidated into the Multi-District Litigation ("MDL") pending before this court against
4 WaMu. (See No. 08-md-1919.) Plaintiffs pursue California state law claims of fraud,
5 negligent misrepresentation, breach of fiduciary duty, and violations of California
6 Corporations Code § 25400 et seq. (No. C08-387, Dkt. No. 99 at 8.) Both cases were
7 removed to federal court pursuant to 28 U.S.C. § 1446(d), and transferred to the WaMu MDL
8 pending in this Court. (No. C09-664, Dkt. No. 1; No. C09-816, Dkt. No. 1.) The Court then
9 consolidated both cases with the MDL. (No. C09-664, Dkt. No. 5.)

10 Plaintiffs seek to remand the two cases back to the Superior Court of California on the
11 theory that the Court lacks jurisdiction, that it must abstain under 28 U.S.C. § 1334(c), and,
12 alternatively, that it should invoke its authority to abstain on equitable grounds. (No. 08-md-
13 1919, Dkt. No. 359.)

14 Analysis

15 A. Jurisdiction

16 Plaintiffs assert that the Court lacks jurisdiction because their claims are not "related
17 to" the bankruptcy proceedings involving WaMu. See 28 U.S.C. § 1334(b); (No. C08-387,
18 Dkt. No. 99 at 10-12.) The Court disagrees.

19 Under 28 U.S.C. § 1334(b), the Court has original jurisdiction over all suits "arising in
20 or related to cases under title 11." Section 1334(b) extends jurisdiction to suits that "could
21 conceivably have any effect on the estate being administered in bankruptcy." In re Feitz, 852
22 F.2d 455, 457 (9th Cir. 1988) (quotation omitted). Even if the debtor is not named in the suit
23 that is "related to" the bankruptcy proceeding, jurisdiction under § 1334(b) may exist. See
24 Celotex Corp. v. Edwards, 514 U.S. 300, 307 n.5 (1995) (noting that § 1334(b) applies to
25 "suits between third parties which have an effect on the bankruptcy estate") (quotation
omitted). Where the party has a right to indemnification from the debtor company, a suit

1 against that party is generally “related to” the bankruptcy proceedings. See Carpenters
2 Pension Trust v. Ebberts, 299 B.R. 610, 613 (Bankr. C.D. Cal. 2003). This right need not arise
3 out of an unconditional contractual agreement. See In re Sizzler Rest. Int’l, Inc., 262 B.R.
4 811, 818-19 (Bankr. C.D. Cal. 2001.)

5 Plaintiffs’ claims against the officer and director defendants fall squarely within this
6 Court’s jurisdiction under § 1334(b). First, WaMu is currently in bankruptcy proceedings.
7 (See No. 08-387, Dkt. No. 99 at 10.) Second, Plaintiffs’ allegations against the officer and
8 director defendants have a strong likelihood of affecting the bankruptcy estate. Not only is
9 WaMu contractually obligated to indemnify these defendants against allegations of fraud, but
10 the bankruptcy court has already entered an order permitting WaMu to advance defense costs
11 from WaMu’s Director and Officers (“D&O”) insurance policies to these defendants.
12 (Caplow Decl. Exs. B-D.) This satisfies jurisdiction under § 1334(b). See Ebberts, 299 B.R.
13 at 613. Plaintiffs argue that there is no right to indemnification if these defendants are “finally
14 adjudged” to have engaged in intentional misconduct. (No. C08-387, Dkt. No. 99 at 7 (citing
15 RCW 23B.08.510).) Plaintiffs ignore that the pertinent inquiry is whether Plaintiffs’ claims
16 have a conceivable effect on bankruptcy estate at the time of removal, not at the conclusion of
17 litigation. See Spencer v. U.S. Dist. Court, 393 F.3d 867, 871 (9th Cir. 2004).

18 Plaintiffs’ claims against Deloitte are also “related to” the WaMu bankruptcy
19 proceedings pursuant to § 1334(b). Deloitte asserts that it has potential claims of contribution
20 against WaMu that could reduce the WaMu estate if Plaintiffs are successful in their actions.
21 (No. 08-md-1919, Dkt. No. 355 at 11.) This satisfies jurisdiction under § 1334(b), even
22 absent a contractual indemnity agreement. See In re Sizzler, 262 B.R. at 818-19; In re
23 Lehman Brothers Sec. & ERISA Litig., 09-MD-2017 (LAK), Pretrial Order No. 8 (S.D.N.Y.
24 Apr. 22, 2009) (holding that an auditor’s potential claims for contribution from the
25 bankruptcy estate cause the action against the auditor to fall within § 1334(b) jurisdiction).

The Court also has supplemental jurisdiction over the claims against Deloitte, which arise out

1 of the same case and controversy against the officers and director defendants which gives this
2 Court original jurisdiction. 28 U.S.C. § 1367(a); see Security Farms v. Int'l Bhd. of
3 Teamsters, 124 F.3d 999, 1008 n.5 (9th Cir. 1997). Jurisdiction is proper in this Court.

4 B. Abstention

5 Plaintiffs ask the Court to remand the cases pursuant to the mandatory and permissive
6 abstention provisions of 28 U.S.C. § 1334(c). Plaintiffs' request is unavailing.

7 "Abstention can exist only where there is a parallel proceeding in state court."
8 Security Farms, 124 F.3d at 1009. This applies to both mandatory and permissive abstention.
9 Id. at 1010. When the underlying state proceedings are removed to federal court, they are no
10 longer considered pending in state court. See id. Here, both actions were removed to federal
11 court, and are no longer pending in state court. With no pendant state actions, § 1334(c) is
12 inapplicable. The Court rejects Plaintiffs' request.

13 C. Equitable Abstention

14 Plaintiffs ask the Court to remand on the basis of equitable abstention. Seven factors
15 are relevant to the Court's consideration. Bally Total Fitness Corp. v. Contra Costa Retail
16 Ctr., 384 B.R. 566, 572 (Bankr. N.D. Cal. 2008). Those factors are: (1) "the effect of the
17 action on the administration of the bankruptcy estate"; (2) the extent to which issues of state
18 law predominate and the difficulty of applicable state law; (3) comity; (4) "the relatedness or
19 remoteness of the action to the bankruptcy case"; (5) the right to a jury trial; and (6)
20 "prejudice to the party involuntarily removed from state court." Id.

21 The equities weigh against Plaintiffs' request for abstention. First, having multiple
22 cases outside the MDL seeking contribution from the WaMu estate weighs heavily against
23 abstention. Second, while Plaintiffs' claims are based on state law, they are not unusual or
24 complex. See In re Diversified Contract Servs., Inc., 167 B.R. 591, 597 (Bankr. N.D. Cal.
25 1994). Third, Plaintiffs have not shown that comity is better served by remand. Fourth, these
cases are not remote to the bankruptcy proceedings, as described above. Fifth, Plaintiffs have


1 a right to jury in this Court. Sixth, Plaintiffs have demonstrated that there may have been
2 some delay caused by removing these cases to this Court. On balance, these factors weigh
3 against abstention. See Ankenbrandt v. Richards, 504 U.S. 689, 705 (1992) (“[F]ederal courts
4 have a virtually unflagging obligation to exercise the jurisdiction given them.”).

5 **Conclusion**

6 Plaintiffs have not shown why the Court lacks jurisdiction under § 1334(b) or why
7 abstention under § 1334(c) is proper. Further, the equities weigh strongly against the Court
8 exercising its discretionary authority to abstain. These two cases will remain consolidated
9 with the MDL proceedings, and Plaintiffs’ motion is DENIED.

10 The Clerk is directed to send a copy of this order to all counsel of record.

11 DATED this 2nd day of November, 2009.

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14 Marsha J. Pechman
15 United States District Judge
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